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# In the Supreme Court of the United States

GALE NORTON, SECRETARY
OF THE INTERIOR, ET AL., PETITIONERS

*v.*

SOUTHERN UTAH WILDERNESS ALLIANCE, ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE TENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

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## QUESTION PRESENTED

Whether the authority of the federal courts under the Administrative Procedure Act (APA), 5 U.S.C. 706(1), to "compel agency action unlawfully withheld or unreasonably delayed" extends to the review of the adequacy of an agency's ongoing management of public lands under general statutory standards and its own land use plans.

## PARTIES TO THE PROCEEDINGS

The petitioners in this Court are Gale Norton, Secretary of the Interior; Kathleen Clarke, Director of the Bureau of Land Management, and the Bureau of Land Management. The respondents are:

Southern Utah Wilderness Alliance

The Wilderness Society

The Sierra Club

Great Old Broads for Wilderness

Wildlands CPR

Utah Council of Trout Unlimited

American Lands Alliance

The Friends of the Abajos

The State of Utah

San Juan County

Emery County

Utah School and Institutional Trust Lands Administration

Utah Shared Access Alliance

Blue Ribbon Coalition

Elite Motorcycle Tour

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No. 03-101

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*v.*

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*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF FOR THE PETITIONERS

### OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-54a) is reported at 301 F.3d 1217. The opinion of the district court (Pet. App. 55a-76a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. A petition for rehearing was denied on February 18, 2003 (Pet. App. 77a). On May 12, 2003, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including June 18, 2003, and, on June 6, 2003, Justice Breyer extended that time to and including July 18, 2003. The petition for writ of certiorari was filed on July 18, 2003, and was granted on November 3, 2003. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of Titles 5, 42, and 43 of the United States Code and Title 43 of the Code of Federal Regulations are reproduced in the Appendix to this brief.

## STATEMENT

This case concerns the scope of a federal court's authority under the Administrative Procedure Act (APA) to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1). A divided panel of the Tenth Circuit held that a plaintiff may invoke Section 706(1) to challenge the adequacy of an agency's day-to-day administration of a government program—here, an agency's management of certain public lands. The panel held that Section 706(1) is not confined to suits to compel final agency action of the sort that, once taken by the agency, would be reviewable under Section 706(2) of the APA. The panel went on to hold that Section 706(1) may be used to enforce generally stated statutory standards, which leave an agency with considerable discretion regarding their definition and implementation, and to order an agency to achieve goals and objectives set out in its own planning documents, even in the absence of any proposed site-specific action.

1. The Bureau of Land Management (BLM) administers approximately 23 million acres of federal lands in the State of Utah. This case challenges aspects of BLM's management of those lands with respect to off-road vehicle usage.

Within the federal lands administered by BLM in Utah are a number of "wilderness study areas," or WSAs. The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. 1701 *et seq.*, directs the Secretary of the Interior to review, and to recommend to the President, whether certain roadless areas of federal lands are suitable for designation by Congress as wilderness. 43 U.S.C.



1782(a); see 16 U.S.C. 1131(c) (defining wilderness). FLPMA further provides that, "[d]uring the period of review of such areas and until Congress has determined otherwise," the areas are to be managed "in a manner so as not to impair [their] suitability * * * for preservation as wilderness." 43 U.S.C. 1782(c).[1]

In 1979, to implement FLPMA's "non-impairment of suitability" standard, BLM issued its Interim Management Policy and Guidelines for Lands Under Wilderness Review, 44 Fed. Reg. 72,014, which has periodically been revised. See BLM, U.S. Dep't of the Interior, *Interim Management Policy for Lands Under Wilderness Review* (visited Jan. 5, 2004) <http:www.ut.blm.gov/utahwilderness/imp/imp.htm>. The Interim Management Policy interprets that standard to require BLM to manage each wilderness study area to prevent it from being "degraded so far, compared with the area's values for other purposes, as to significantly constrain the Congress's prerogative to either designate [it] as wilderness or release it for other uses." *Id.* Intro. The Interim Management Policy makes clear, however, that "[m]anagement to the nonimpairment standard does not mean that the lands will be managed as though they had already been designated as wilderness." *Ibid.* Among other things, the Interim Management Policy restricts motor vehicle use within wilderness study areas to existing "ways" (*i.e.*, unimproved traces maintained only by the passage of vehicles) and designated "open" areas. *Id.* Ch. 1, at B-11.

In 1980, BLM designated 2.5 million acres of public lands in Utah as wilderness study areas. 45 Fed. Reg. 75,602. In 1990, the Secretary recommended to the President, who subsequently recommended to Congress, that 1.9 million of

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[1] A wilderness area, once designated by Congress, is to be managed to "preserve[] [its] wilderness character." 16 U.S.C. 1133(b); see, *e.g.*, 16 U.S.C. 1133(c) (prohibiting motor vehicles, with certain exceptions, in wilderness areas).

those acres be designated as wilderness. See *Utah* v. *Babbitt*, 137 F.3d 1193, 1199 (10th Cir. 1998). Congress has not acted on that recommendation.[2]

BLM manages other federal lands in Utah (*e.g.*, areas that are not wilderness areas or wilderness study areas) in accordance with provisions of FLPMA that are generally applicable to all federal lands. See, *e.g.*, 43 U.S.C. 1732(b) ("In managing the public lands the Secretary shall * * * take any action necessary to prevent unnecessary or undue degradation of the lands."). FLPMA requires BLM to develop land use plans for units of public lands under its administration, see 43 U.S.C. 1712(a) and (c); to "manage the public lands * * * in accordance with the land use plans," 43 U.S.C. 1732(a); and to revise the land use plans "when appropriate," 43 U.S.C. 1712(a). BLM's regulations provide that "[a]ll future resource management authorizations and actions * * * and subsequent more detailed or specific planning, shall conform to the approved plan." 43 C.F.R. 1610.5-3(a).[3]

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[2] On April 11, 2003, the Secretary of the Interior and the State of Utah agreed to settle a lawsuit that, among other things, involved the possible designation of additional wilderness study areas in Utah. See Stipulation and Joint Motion to Enter Order Approving Settlement and to Dismiss the Third Amended and Supplemented Complaint, *Utah* v. *Norton*, No. 96-CV-870 (D. Utah); see *Utah*, 137 F.3d at 1199-1200. Under the terms of that settlement, the Secretary acknowledged that her authority to designate wilderness study areas under 43 U.S.C. 1782(a) expired in 1993. BLM will continue, however, to exercise its authority under 43 U.S.C. 1711, to inventory resources for certain values, including wilderness values. The settlement does not apply to any previously designated wilderness study areas or otherwise affect any of the claims before the Court in this case. SUWA, as intervenor in that case, has appealed the entry of the settlement, and the Secretary and Utah have moved to dismiss the appeal.

[3] FLPMA refers to "land use plans," while BLM's regulations refer to "resource management plans," defining that term as "a land use plan as described by [FLPMA]." 43 C.F.R. 1601.0-5(k). The term "land use plan" is used in this brief to refer to the resource management plans developed by BLM pursuant to FLPMA.



2. In 1999, Southern Utah Wilderness Alliance and other organizations (collectively SUWA), which are among the respondents here, filed suit under 5 U.S.C. 706(1) against the Secretary of the Interior, the Director of BLM, and BLM. As relevant here, SUWA claimed that BLM had "failed to perform its statutory and regulatory duties" to protect public lands in Utah from damage allegedly caused by off-road vehicle use. Pet. App. 3a. SUWA also claimed that BLM had failed to implement provisions of its land use plans relating to management of off-road vehicles. *Ibid.* SUWA further claimed that BLM had failed to take a "hard look" at whether, pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, supplemental environmental analyses should be undertaken for areas in which off-road vehicle use had increased. Pet. App. 3a; see Br. in Opp. App. 1-26 (reproducing second amended complaint).

SUWA thereafter filed a motion for a preliminary injunction. The motion sought to compel BLM to prohibit off-road vehicle use in four wilderness study areas and five additional areas. Groups representing the interests of off-road vehicle users and an individual user intervened to oppose the suit. Pet. App. 3a-4a; see SUWA C.A. App. 44-92 (Mem. in Supp. of Mot. for Prelim. Inj.).

After an evidentiary hearing, the district court denied SUWA's motion for a preliminary injunction and granted the intervenors' motion to dismiss four of the complaint's causes of action as not cognizable under 5 U.S.C. 706(1). Pet. App. 55a-76a.[4] The court characterized Section 706(1) as "a very

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[4] The district court dismissed the first, fifth, sixth, and seventh causes of action in the second amended complaint with prejudice and the ninth cause of action without prejudice. Pet. App. 75a-76a. SUWA did not appeal the dismissal of the first count. SUWA C.A. Br. 6 n.4. After the filing of the certiorari petitions, SUWA filed a third amended complaint. The third, fourth, and fifth causes of action in the third amended complaint correspond to the fifth, sixth, and seventh causes of action in the second amended complaint. Compare Br. in Opp. App. 20-22 with *id.* at 42-45.

narrow exception to the APA's limitation of judicial review of final agency action," which "has been narrowly construed to prevent judicial intrusion into the day-to-day workings of agencies" and has been understood to provide relief that "is essentially the equivalent of mandamus." *Id.* at 59a. The court consequently reasoned that Section 706(1) affords a remedy only when an agency is subject to a "clear nondiscretionary duty" and "only where there is a genuine failure to act." *Id.* at 59a-60a.

The district court held that SUWA's claim that BLM had failed to prevent impairment of the suitability of the wilderness study areas for wilderness designation was "a complaint about the sufficiency of BLM's action, rather than a genuine failure to act" cognizable under Section 706(1). Pet. App. 65a; see *id.* at 62a-66a. The court observed that BLM had presented "significant evidence about the steps it is and has been taking to prevent * * * impairment" of those areas, and that even SUWA had acknowledged that BLM was taking some action in that regard. *Id.* at 65a-66a.

Similarly, the district court held that Section 706(1) did not provide a basis for SUWA to challenge BLM's alleged failure to complete monitoring and planning activities identified in its land use plans. Pet. App. 67a-68a. The court explained that SUWA's claims were again about the "sufficiency of BLM's actions," and that "there has not been a complete failure to perform a legally required duty that would trigger a review under § 706(1)." *Ibid.* The court also concluded that, because the relevant regulation requires BLM to adhere to its land use plans only when undertaking "future resource management authorizations and actions * * * and subsequent more detailed or specific planning," 43 C.F.R. 1610.5-3(a), BLM's alleged noncompliance with a land use plan may be challenged only in connection with "some site-specific action * * * that does not conform to the plan." Pet. App. 67a.



The district court further held that BLM was not required under NEPA to take a "hard look" at whether increased off-road vehicle use required the preparation of supplemental environmental analyses. Pet. App. 74a. The court reasoned that BLM did not have "a clear duty to act under NEPA" to consider the need to supplement its earlier environmental analyses. *Ibid.* "Indeed," the court added, "the decision whether to prepare a supplemental environmental impact statement is the kind of factual question that implicates agency technical expertise and requires courts to 'defer to the informed discretion of the responsible federal agencies.'" *Ibid.* (quoting *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 377 (1989)).

The district court certified its dismissal of SUWA's claims as a final judgment under Rule 54(b) of the Federal Rules of Civil Procedure. See Pet. App. 4a & n.1.

3. A divided panel of the Tenth Circuit reversed and remanded the case for consideration of the merits of SUWA's claims. Pet. App. 1a-54a.

a. The court of appeals held that SUWA could assert a challenge under Section 706(1) to BLM's alleged failure to comply with its duty under FLPMA to manage the wilderness study areas at issue "so as not to impair the suitability of such areas for preservation as wilderness." Pet. App. 14a (citing 43 U.S.C. 1782(c)). The court concluded that the "agency action" that may be compelled under Section 706(1) includes not only "final, legally binding actions," but also "day-to-day management actions" such as BLM's ongoing management of the wilderness study areas. *Id.* at 15a-16a. While acknowledging that agency action may be compelled under Section 706(1) "only where the agency fails to carry out a mandatory, nondiscretionary duty," *id.* at 10a, the court concluded that FLPMA's general requirement that BLM manage the wilderness study areas to prevent impairment of their suitability for wilderness designation is

mandatory and non-discretionary, and thus may be enforced in a suit under Section 706(1). *Id.* at 13a. The court further held that relief may be warranted under Section 706(1) notwithstanding that BLM has "taken some action * * * to address impairment" of the wilderness study areas. *Id.* at 19a.

The court of appeals also held that Section 706(1) permits a challenge to BLM's alleged failure to accomplish certain management goals and activities identified in its land use plans. Pet. App. 24a-32a. The court reasoned that a mandatory, non-discretionary duty to complete those tasks arises from FLPMA's provision that public lands "shall [be] manage[d] * * * in accordance with the land use plans," 43 U.S.C. 1732(a); from regulations that the court understood to require BLM to "adhere to the terms, conditions, and decisions" of such plans, 43 C.F.R. 1601.0-5(c); and from language in the relevant land use plans stating that off-road vehicle use "will be monitored" in one area and that an off-road vehicle implementation plan "will be developed" for another area. Pet. App. 26a. While acknowledging that Congress intended BLM's land use plans "to be dynamic documents, capable of adjusting to new circumstances and situations," *id.* at 27a, the court concluded that BLM "can be held accountable for failing to act as required by the mandatory duties outlined in" such plans. *Id.* at 28a. The court also concluded that BLM could be compelled under Section 706(1) to comply with provisions of a land use plan even in circumstances, such as those here, in which BLM is not undertaking any "site-specific project." *Id.* at 28a-29a.

Finally, the court of appeals held that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the preparation of supplemental environmental analyses under NEPA. Pet. App. 32a-39a. The court found it irrelevant to the availability of relief under Section 706(1) that BLM intended to perform additional NEPA analyses in the near



future in connection with its revision of existing land use plans, and that compelling BLM to undertake the NEPA analyses sought by SUWA would divert BLM's resources from other current and planned NEPA activities. *Id.* at 37a-38a. Instead, the court concluded that claims of inadequate resources would have to be raised as a defense in any contempt proceeding that might arise if BLM failed to carry out a duty after being ordered by the district court to do so. *Id.* at 38a.

b. Senior Judge McKay dissented in part. Pet. App. 39a-54a. First, he reasoned that Section 706(1) does not provide a vehicle for "claims challenging an agency's overall method of administration or for controlling the agency's day-to-day activities." *Id.* at 43a. He viewed the majority's decision as "essentially transform[ing] § 706(1) into an improper and powerful jurisdictional vehicle to make programmatic attacks on day-to-day agency operations." *Id.* at 46a. Second, he reasoned that Section 706(1) authorizes challenges only to "true agency inaction," not agency efforts that merely "fall[] short of completely achieving the agency's obligations." *Ibid.* Finally, he stated that Section 706(1) does not permit plaintiffs to challenge "an agency's failure to meet each and every goal set out in its land use plans," *id.* at 51a, observing that such challenges "would allow plaintiffs of all varieties to substantially impede an agency's day-to-day operations," *id.* at 50a.[5]

## SUMMARY OF ARGUMENT

I. The APA confines judicial review to those instances in which an agency has taken, or has a clear, mandatory duty to take, a discrete "agency action," such as the issuance of a rule or an order. And, unless Congress has provided otherwise, judicial review is further confined to agency

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[5] Judge McKay did not dissent from the court of appeals' holding on the NEPA issue. Pet. App. 39a.

action that is "final," *i.e.*, that both concludes the agency's decisionmaking process and determines rights or obligations. Those constraints, which the APA drew from settled principles of judicial review previously articulated by this Court, preserve agencies' and courts' separate spheres of authority and thereby reinforce the constitutional separation of powers.

Consistent with that legal framework, Section 706(1), which authorizes courts to "compel agency action unlawfully withheld or unreasonably delayed," may be invoked only when an agency has failed to complete a distinct final action —the same sort of action that may be reviewed under the more commonly invoked Section 706(2), which authorizes courts to "set aside agency action" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Moreover, consistent with the understanding that Section 706(1) was designed to codify existing mandamus practice, Section 706(1) does not permit a court to interfere with an agency's exercise of its judgment or discretion: Under Section 706(1), although a court may direct an agency *to act* when action is clearly required by law, a court may not direct an agency *how to act*. Accordingly, Section 706(1) is not a suitable vehicle for judicial scrutiny of an agency's day-to-day administration of a program—such as its management of public lands—pursuant to general statutory standards that vest the agency with wide discretion regarding their interpretation and implementation.

II. None of the three categories of claims at issue in this case is cognizable under Section 706(1), as properly construed to permit a court only to compel discrete final agency action, and not to intrude into the exercise of agency discretion.

A. FLPMA's requirement that BLM manage wilderness study areas "in a manner so as not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c),



is not judicially enforceable under Section 706(1). That provision of FLPMA does not require BLM to take any particular final agency action in its administration of wilderness study areas. The court of appeals erred in concluding that Section 706(1) permits the district court to engage in a necessarily wide-ranging inquiry into the adequacy of BLM's compliance with that standard in its day-to-day management of the wilderness study areas in Utah. Such an inquiry would invite the district court improperly to substitute its judgment and discretion for those of the agency, to order the taking of measures that are different from or in addition to those taken by the agency, and to exceed its proper role under Article III of the Constitution.

B. BLM's compliance with NEPA's requirement that agencies analyze the environmental consequences of proposed "major Federal actions," 42 U.S.C. 4332(2)(C), is likewise not judicially enforceable under Section 706(1). An agency's environmental impact statement under NEPA—whether initial or supplemental—is not itself final agency action within the meaning of the APA. It is instead the sort of "preliminary, procedural, or intermediate agency action" that is "not directly reviewable" under the APA, although it is reviewable under Section 706(2) in connection with subsequent final agency action for which the environmental analysis was required by NEPA. 5 U.S.C. 704. Here, moreover, because BLM has not decided whether to propose any "major Federal action" in the areas at issue, NEPA does not impose any duty on BLM to supplement an existing environmental analysis.

C. The goals and objectives that BLM sets out for itself in its land use plans are not judicially enforceable under Section 706(1). Many such objectives, such as the off-road vehicle monitoring that SUWA sought to compel here, do not require the taking of any final agency action. More fundamentally, a land use plan is not a source of mandatory, non-

discretionary duties that are owed to particular members of the public and that may be compelled in a suit under Section 706(1). A land use plan is instead a fluid, process-oriented document produced by BLM itself to guide its ongoing management and planning and its future site-specific activities with respect to a large area of public land. BLM's ability to accomplish the objectives that it sets for itself, and to do so within any time frames that it sets for itself, is necessarily contingent on available resources and competing priorities. Section 706(1) does not authorize courts to reorder BLM's agenda for the allocation of limited resources among various management and planning objectives.

## ARGUMENT

## SECTION 706(1) DOES NOT PROVIDE AUTHORITY FOR A COURT TO REVIEW THE ADEQUACY OF AN AGENCY'S ONGOING MANAGEMENT OF PUBLIC LANDS UNDER GENERAL STATUTORY STANDARDS AND ITS OWN LAND USE PLANS

### I. Section 706(1) Authorizes A Court Only To Direct An Agency To Complete Discrete Final Agency Action That Has Been "Unlawfully Withheld Or Unreasonably Delayed"

The APA does not authorize the federal courts to entertain challenges to anything and everything that an agency may do, or fail to do, in the conduct of its business. The APA instead confines judicial intervention to those instances in which the agency has taken, or has a duty to take, a discrete final agency action. That conclusion is compelled by the APA's text, history, and purposes. It applies equally whether an APA suit seeks to "compel agency action" under Section 706(1) or to "set aside agency action" under Section 706(2).



#### A. The text of the APA makes clear that a court may "compel" under Section 706(1) only the sort of final agency action that a court may "set aside" under Section 706(2)

##### *1. The APA confines judicial review to challenges to final agency action*

Section 702 of the APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. 702. Section 706, the APA provision principally at issue in this case, defines the scope of such review. As relevant here, Section 706 states that "[t]he reviewing court shall—(1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be," *inter alia*, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706.

Judicial review under the APA is thus limited to "agency action," which the APA defines as "includ[ing] the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. 551(13); see 5 U.S.C. 701(b)(2). All of the specific examples of "agency action" given in Section 551(13) are discrete products of a focused decisionmaking process by the agency—such as the promulgation of a rule,[6] the issuance of an order,[7]

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[6] See 5 U.S.C. 551(4) (defining "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency").

[7] See 5 U.S.C. 551(6) (defining "order" as "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making").

the grant or denial of a license,[8] the imposition of a sanction or the refusal to impose one,[9] or the allowance or withholding of relief.[10] The term "the equivalent or denial thereof" is properly understood to refer to similarly discrete actions, in accordance with the canon that general terms are known by their more specific companions. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 384-385 (2003). Likewise, the term "failure to act" is properly understood to refer to a failure to promulgate a rule, issue an order, or take other discrete action of the sort identified in Section 551(13).

Judicial review under the APA is further limited, absent a specific statute providing otherwise, to "*final* agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704 (emphasis added). This Court has explained that agency action, in order to be "final" and reviewable under the APA, both "must mark the consummation of the agency's decisionmaking process" and "must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (internal quotation marks omitted); accord *Dalton* v. *Specter*, 511 U.S. 462, 469-471 (1994); *Franklin* v. *Massachusetts*, 505 U.S. 788, 797-798 (1992); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 239-243 (1980); *Chicago & S. Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-113 (1948) ("[A]dministrative orders are not reviewable unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.").

[8] See 5 U.S.C. 551(8) (defining "license" as including "the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission").

[9] See 5 U.S.C. 551(10) (defining "sanction" as including "the whole or a part of an agency * * * prohibition, requirement, limitation, or other condition affecting the freedom of a person"; "withholding of relief"; "imposition of penalty or fine"; "destruction, taking, seizure, or withholding of property"; "assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees"; "requirement, revocation, or suspension of a license"; or "other compulsory or restrictive action").

[10] See 5 U.S.C. 551(11) (defining "relief" as including "the whole or a part of an agency * * * grant of money, assistance, license, authority, exemption, exception, privilege, or remedy"; "recognition of a claim, right, immunity, privilege, exemption, or exception"; or "other action on the application or petition of, and beneficial to, a person").



Such reviewable "final agency action" is readily distinguishable from an agency's day-to-day administration of its programs. This Court recognized as much in *Lujan* v. *National Wildlife Federation*, 497 U.S. 871 (1990). That case presented a challenge under Section 706(2) of the APA to "the continuing (and thus constantly changing) operations of the BLM" in, *inter alia*, classifying public land, developing and revising land use plans, and acting on requests to restore land to the public domain. 497 U.S. at 890; see *id.* at 877-879. The Court held that those activities could not be challenged "*wholesale*" under Section 706(2), because they did not constitute "an identifiable 'agency action'—much less a 'final agency action'"—within the meaning of the APA. *Id.* at 890, 891. "Under the terms of the APA," the Court explained, a plaintiff "must direct its attack against some particular 'agency action' that causes it harm," *id.* at 891, and "cannot demand a general judicial review of [an agency's] day-to-day operations," *id.* at 899.

As the Court acknowledged in *National Wildlife Federation*, such a "case-by-case approach"—which "is the traditional, and remains the normal, mode of operation of the courts"—may be an inefficient means of seeking "systemic improvement" in agency operations. 497 U.S. at 894. But the Court explained that "more sweeping actions are for the other branches." *Ibid.* Hence, the Court observed that the APA does not permit a party to "seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress,

where programmatic improvements are normally made." *Id.* at 891.[11]

***2. Section 706(1) allows courts to compel only final agency action that, if taken, could be reviewed under Section 706(2)***

An agency's "day-to-day operations" no more constitute reviewable "agency action" that may be "compel[led]" under Section 706(1) than they constitute reviewable "agency action" that may be "set aside" under Section 706(2). Section 706(1) authorizes courts to compel only discrete final action that the agency has unlawfully withheld or unreasonably delayed.

Congress intended the term "agency action" to have the same meaning in Section 706(1) as it has in Section 706(2). Congress provided that "[f]or the purpose of this chapter"—*i.e.*, the judicial review provisions of the APA, including both Section 706(1) and Section 706(2)—"'agency action' ha[s] the meaning[] given [it] by section 551 of this title." 5 U.S.C. 701(b)(2); see pp. 13-14, *supra* (discussing Section 551). And even aside from Section 701(b)(2), a term is presumed "to mean the same thing throughout a statute," especially "when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Judicial review is thus

[11] Accord, *e.g.*, *Independent Petroleum Ass'n of Am.* v. *Babbitt*, 235 F.3d 588, 595 (D.C. Cir. 2001) (holding that challenge to Department of Interior's "efforts to collect" certain royalties was not cognizable under Section 706(2), because, "[l]ike the 'program' in [*National Wildlife Federation*], the 'efforts' that [plaintiff] seeks to challenge do not refer to any particular action taken by [the Department], much less to any particular order, regulation, or completed universe of orders or regulations"); *Sierra Club* v. *Peterson*, 228 F.3d 559, 565-566 (5th Cir. 2000) (en banc) (holding that challenge to Forest Service's timber harvesting "program" for Texas forests was not cognizable under Section 706(2), because plaintiff was advancing a "programmatic challenge[]," not a challenge to "a specific and final agency action"), cert. denied, 532 U.S. 1051 (2001).



confined under Section 706(1), as under Section 706(2), to discrete "agency action."

Section 704's requirement of "final agency action" likewise applies to suits under Section 706(1) as well as to those under Section 706(2). Section 704 provides that finality is a condition of "judicial review" under the APA, without distinguishing between review under Section 706(1) of an agency's failures to act and review under Section 706(2) of an agency's affirmative acts. Section 706(1) thus authorizes a court to compel only final agency action, *i.e.*, an action that culminates the agency's decisionmaking process and "by which rights or obligations have been determined, or from which legal consequences will flow," *Bennett*, 520 U.S. at 177-178—the sort of action that, if taken by the agency rather than withheld or delayed, would be reviewable under Section 706(2).

Consequently, unless review is otherwise barred by Section 701(a)(1) or (2), Section 706(1) permits a court to order an agency to respond to a rulemaking petition within a reasonable time (see, *e.g.*, *Public Citizen Health Research Group* v. *Commissioner, Food & Drug Admin.*, 740 F.2d 21, 34-35 (D.C. Cir. 1984)), or to make a "final determination" on an administrative complaint (see, *e.g.*, *Brock* v. *Pierce County*, 476 U.S. 253, 259, 260 n.7 (1986)), or to act on a permit application (see, *e.g.*, *Costle* v. *Pacific Legal Found.*, 445 U.S. 198, 220 n.14 (1980)). A court may not, however, order an agency to conduct its "day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, such as its ongoing management of public lands, differently from how they are being conducted. See, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d 559, 563, 568 (5th Cir. 2000) (en banc) (holding that challenge to Forest Service's "entire program of allowing timber harvesting in the Texas forests" was not cognizable under Section 706(1) on "the * * * theory that the Forest

Service 'failed to act'" to protect natural resources), cert. denied, 532 U.S. 1051 (2001).

### B. Confining Section 706(1) to suits to compel discrete final agency action comports with the APA's purposes and the Constitution's separation of powers

The judicial review chapter of the APA, including Section 706(1), was not intended to give courts expansive new authority to intervene in agency affairs. It was instead designed to codify the existing law of judicial review, which had been developed by this Court and other courts to preserve the separate spheres of authority of the Executive and Judicial Branches. Under that existing law, although a court could order a government official to take a specific action that was unequivocally commanded by an Act of Congress, a court could not direct the official's exercise of judgment and discretion in the conduct of his ongoing responsibilities.

#### *1. The APA's judicial review chapter reflects Congress's purpose to circumscribe courts' intervention into agencies' affairs*

Congress sought in the judicial review chapter of the APA to strike an appropriate balance "between the goal of efficient and effective agency action, on the one hand, and the value of judicial review in ensuring the rationality and fairness of agency decisionmaking, on the other." *NRDC, Inc.* v. *SEC*, 606 F.2d 1031, 1048 (D.C. Cir. 1979). The Attorney General's Committee on Administrative Procedure, whose work informed the drafting of the APA, advised Congress that the object of judicial review is "to *check*—not to *supplant*—administrative action." S. Doc. No. 8, 77th Cong., 1st Sess. 77 (1941); see S. Rep. No. 752, 79th Cong., 1st Sess. 4 (1945) (describing Committee's contribution). The Committee explained that "[r]eview must not be so extensive as to destroy the values—expertness, specialization, and the like—which * * * were sought in the establishment



of administrative agencies." S. Doc. No. 8, *supra*, at 77. The Committee added that the Constitution—in particular, its requirement that federal "'judicial power' may be exercised only in 'cases' and 'controversies'"—also operates to constrain courts from assuming legislative or administrative powers. *Id.* at 79.

The judicial review chapter of the APA was thus designed, consistent with the advice of the Attorney General's Committee, not only to confirm but also to cabin the courts' oversight of the activities of federal agencies. That design is evident in the provisions that withhold judicial review entirely when "statutes preclude judicial review" or "agency action is committed to agency discretion by law" (5 U.S.C. 701(a)(1) and (2)); that permit only persons who are "adversely affected or aggrieved by agency action" or "suffering legal wrong because of agency action" to seek review (5 U.S.C. 702); that mandate a deferential standard of review (5 U.S.C. 706(2)); and that generally limit judicial review to "final agency action" (5 U.S.C. 704). Those provisions were derived from "the existing law concerning the scope of judicial review," S. Rep. No. 752, *supra*, at 44 (App. B), which had served to prevent courts from intruding excessively or prematurely into agency functions. See S. Doc. No. 8, *supra*, at 83-92 (describing existing law of judicial review).

Congress was well aware of the function served by the final agency action requirement, in particular, in protecting agencies against undue intrusion by courts. The Attorney General's Committee informed Congress that "[t]he requirement of finality of administrative action and exhaustion of administrative remedies as a prerequisite of judicial review" was already well established by court decisions and agency-specific statutes. S. Doc. No. 8, *supra*, at 85. The Committee observed that the final agency action requirement not only served the same purposes as the final judgment rule within a system of superior and inferior courts, but also served other

important purposes, given "the added factor that court and agency are not parts of the same hierarchy." *Ibid.*; see *FCC* v. *Pottsville Broad. Co.*, 309 U.S. 134, 141-144 (1940) (discussed at p. 21, *infra*). The Committee explained that "[m]aintenance of amicable relations between them and avoidance of disrupting conflict requires generally that the administrative agency be permitted to finish its job before the court steps in." S. Doc. No. 8, *supra*, at 85; see *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 130 (1939) (explaining that the Court's consistent refusal to review agency action that "does not of itself adversely affect complainant, but only affects his rights adversely on the contingency of future administrative action," was grounded in "traditional conceptions of federal judicial power," under which "resort to the courts in these situations is either premature or wholly beyond their province").

***2. Section 706(1), like the APA's other judicial review provisions, was not intended to allow courts to exercise nonjudicial functions***

Section 706(1) does not manifest any departure from the general approach of the APA's judicial review chapter. To the contrary, Section 706(1) can only properly be understood, consistent with its roots in mandamus (see pp. 22-25, *infra*), as a narrow remedy to compel a discrete final action that an agency is required by law to take or complete.

a. Congress was assured during its consideration of the APA that the courts' role under Section 706(1) was to be a very limited one. The Senate Judiciary Committee, for example, explained that, under Section 706(1), "[t]he court may require agencies to act, but may not under this provision tell them how to act in matters of administrative discretion." Senate Comm. on the Judiciary, 79th Cong., 1st Sess., *Administrative Procedure Act* (Comm. Print 1945), *reprinted in Administrative Procedure Act: Legislative History 79th Congress, 1944-1946*, at 40 (photo. reprint Sept. 1, 1970) (1946).



The Attorney General similarly emphasized, in an analysis that was appended to the Senate Report on the APA, that Section 706(1) was "not intended to confer any nonjudicial functions or to narrow the principle of continuous administrative control enunciated by the Supreme Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*" S. Rep. No. 752, *supra*, at 44. In *Pottsville Broadcasting*, after holding that the FCC had committed a legal error in disqualifying an applicant for a license, the court of appeals issued a writ of mandamus to prevent the FCC from allowing new applicants to compete for the license. This Court directed that the writ be dissolved, explaining that the court of appeals could not "write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors," and thereby prevent the FCC on remand from "enforcing the legislative policy committed to its charge." 309 U.S. at 145. "Unless the[] vital differentiations between the functions of judicial and administrative tribunals are observed," the Court explained, "courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine." *Id.* at 144.

Congress enacted Section 706(1), moreover, with the guidance of the Attorney General's Committee, which advised that courts generally cannot, and should not, order agencies to perform their duties in a manner that the courts might believe to be more effective:

> [J]udicial review is rarely available, theoretically or practically, to compel effective enforcement of the law by the administrators. It is adapted chiefly to curbing excess of power, not toward compelling its exercise. Constitutional limitations may in some cases forbid the use of judicial power to correct underenforcement. But constitutional difficulties aside, the courts cannot, as a practical

> matter, be effectively used for that purpose without being assimilated into the administrative structure and losing their independent organization.

S. Doc. No. 8, *supra*, at 76. The Committee explained that the goal of assuring that agencies carry out the duties assigned to them by Congress must instead depend largely "on controls other than judicial review—internal controls in the agency, responsibility to the legislature or the executive, careful selection of personnel, pressure from interested parties, and professional or lay criticism of the agency's work." *Ibid.* Congress was surely mindful of that advice in its subsequent drafting of Section 706(1).

b. The Attorney General reiterated the narrow scope of Section 706(1) in a comprehensive exposition of the APA prepared shortly after its enactment. See United States Dep't of Justice, *Attorney General's Manual on the Administrative Procedure Act* 108 (1947) (*Attorney General's Manual*). This Court has traditionally given weight to the *Attorney General's Manual* in interpreting the APA, "since the Justice Department was heavily involved in the legislative process that resulted in the Act's enactment in 1946." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979); see *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 218 (1988) (Scalia, J., concurring) (noting that this Court has "repeatedly given great weight" to the *Attorney General's Manual* in its interpretation of the APA).

In describing Section 706(1) (Clause (A) of Section 10(e) of the APA as enacted in 1946), the *Attorney General's Manual* states:

> Clause (A) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed", appears to be a particularized restatement of existing judicial practice under section 262 of the Judicial Code (28 U.S.C. 377). *Safeway Stores, Inc.* v. *Brown*, 138 F.2d 278 (E.C.A., 1943), certiorari denied, 320 U.S. 797.



> The power thus stated is vested in "the reviewing court", which, in this context, would seem to be the court which has or would have jurisdiction to review the final agency action. See *Roche* v. *Evaporated Milk Ass'n.*, 319 U.S. 21, 25 (1943). Orders in the nature of a writ of mandamus have been employed to compel an administrative agency to act, *Safeway Stores, Inc.* v. *Brown, supra*, or to assume jurisdiction, *Interstate Commerce Commission* v. *United States ex rel. Humboldt Steamship Co.*, 224 U.S. 474 (1912), or to compel an agency or officer to perform a ministerial or non-discretionary act. Clause (A) of section 10(e) [*i.e.*, Section 706(1)] was apparently intended to codify these judicial functions.
>
> Obviously, the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. * * * However, as in *Safeway Stores* v. *Brown*, *supra*, a court may require an agency to take action upon a matter, without directing how it shall act.

*Attorney General's Manual* 108.[12]

The mandamus remedy that Section 706(1) was "intended to codify" was confined to the ordering of a "precise, definite act * * * about which [an official] had no discretion whatever." *United States ex rel. Dunlop* v. *Black*, 128 U.S. 40, 46 (1888) (quoting *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 613 (1838)); see *ICC* v. *New York, New Haven & Hartford R.R.*, 287 U.S. 178, 204 (1932) (describing mandamus as being limited to the enforcement of "a specific,

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[12] Section 262 of the Judicial Code, referred to in the quoted discussion, is the All Writs Act, ch. 231, § 262, 36 Stat. 1162 (now codified at 28 U.S.C. 1651(a)). Section 262 provided: "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

unequivocal command"). This Court had repeatedly explained that mandamus was not available to "guide and control [an official's] judgment or discretion in the matters committed to his care," because such "interference of the Courts with the performance of the ordinary duties of the executive departments of the government[] would be productive of nothing but mischief." *Decatur* v. *Paulding*, 39 U.S. (14 Pet.) 497, 515-516 (1840); see *Louisiana* v. *McAdoo*, 234 U.S. 627, 633 (1914) (explaining that courts cannot issue mandamus to direct how an official exercises his judgment or discretion, because to do so "would be to interfere with the ordinary functions of government").[13]

The "existing judicial practice" reflected in *Safeway Stores*, one of the cases relied upon in the *Attorney General's Manual* (at 108), was likewise one permitting a court to order an official to take a distinct "final action," 138 F.2d at 280, without directing the substance of that action. In *Safeway Stores*, the plaintiff sought judicial review of a maximum price regulation promulgated under the Emergency Price Control Act of 1942, ch. 26, 56 Stat. 23, contending that the Price Administrator's failure to rule on its protests to the regulation, or even to conduct a hearing on them, should be treated as a denial of the protests. 138 F.2d at 278-279. The court held that the governing statute allowed judicial review only after a protest was "actually denied by an overt act of the Administrator." *Id.* at 280. The court went on to observe, however, that a party in the plaintiff's position was not "wholly without remedy in case the Price Administrator improperly delays action upon his protest." *Ibid.* "If the Administrator should unreasonably delay *final action*," the

[13] The courts of appeals have analogized the relief available under Section 706(1) to mandamus relief. See, *e.g.*, *Mt. Emmons Mining Co.* v. *Babbitt*, 117 F.3d 1167, 1170 (10th Cir. 1997); *Independence Mining Co.* v. *Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997); *Potomac Elec. Power Co.* v. *ICC*, 702 F.2d 1026, 1034 (D.C. Cir. 1983).



court explained, "it would seem clear that this court, upon a proper showing, may under the authority of Section 262 of the Judicial Code, in aid of its jurisdiction issue an order in the nature of a writ of mandamus directing the Price Administrator to take action upon a pending protest." *Ibid.* (internal citation omitted and emphasis added). Thus, the *Safeway Stores* court made clear that it could exercise mandamus authority to compel an agency to take action on a discrete matter that had been unreasonably delayed—but only in aid of the court's power to review the agency's "final action" when it ultimately was issued, not in the exercise of any broader, free-ranging power to oversee the agency's conduct.

The *Attorney General's Manual* proceeds on the same premise in stating that the court with jurisdiction to grant relief under Section 706(1) is "the court which has or would have jurisdiction to review the final agency action." It equates the "agency action" that a court may compel under Section 706(1) with the "final agency action" that a court may review under Section 706(2). The *Attorney General's Manual* thus does not contemplate that a court may compel conduct under Section 706(1) of an ongoing programmatic nature that is beyond the authority of a court to review under Section 706(2) as confirmed by this Court in *National Wildlife Federation*.

***3. Confining Section 706(1) to suits to compel final agency action avoids improper intrusion by courts into agency activities***

Construing Section 706(1), consistent with the APA's text, history, and purposes, to permit courts to enforce only clear, non-discretionary duties to take discrete final agency action prevents "interference of the Courts with the performance of the ordinary duties of the executive departments," *Decatur*, 39 U.S. (14 Pet.) at 516, and thereby respects and reinforces the separation of powers under the Constitution.

When a court is asked to order an agency to perform a "precise, definite act" that it "ha[s] no discretion whatever" not to perform, *Black*, 128 U.S. at 46, the court may grant relief against the agency without exercising "any nonjudicial functions," S. Rep. No. 752, *supra*, at 44. The court simply orders the agency to complete the particular agency action that has been unlawfully withheld or unreasonably delayed, without directing what conclusions the agency should reach. See, *e.g.*, *Brock*, 476 U.S. at 260 n.7 (addressing potential availability of an order under Section 706(1) to compel the disposition of an administrative complaint).

That would not be the case, however, if a court were asked to compel an agency to alter its day-to-day administration of a program, such as its ongoing management of public lands. In that situation, the question would not be whether the agency has taken action at all, but instead whether the agency's course of conduct is sufficient to satisfy the typically general standards in the governing statute. And the relief ordered by the reviewing court would not be an order compelling the agency *to act* on a discrete matter, but instead would be an order directing the agency *how to act* in a broad range of matters—*i.e.*, to take steps on a programmatic basis that are different from, or in addition to, the steps that the agency has considered appropriate.[14] Such a case would almost inevitably require a court to substitute its

[14] Indeed, several courts of appeals have held that Section 706(1) authorizes relief "only when there has been a genuine failure to act" by the agency, and not when only the adequacy of the agency's action is at issue. *Ecology Ctr., Inc.* v. *United States Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999); accord, *e.g.*, *Sierra Club* v. *Peterson*, 228 F.3d at 568; *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1107-1109 (D.C. Cir. 1988); *Gillis* v. *United States Dep't of Health & Human Servs.*, 759 F.2d 565, 578 (6th Cir. 1985). Cf. *ICC* v. *United States ex rel. Humboldt S.S. Co.*, 224 U.S. 474, 485 (1912) (holding that mandamus could issue when "the Commission refused to proceed at all, though the law required it to do so," but could direct the Commission only "to take jurisdiction, not in what manner to exercise it").



judgment and discretion for those of the agency—and to do so on a scale that is incompatible with the measured regime for judicial review of agency action that Congress put in place in the APA, as well as with the role of the federal courts under Article III of the Constitution.[15]

Moreover, unless Section 706(1) is understood to permit courts to "compel" only the same sort of "final agency action" that Section 706(2) permits courts to "set aside," plaintiffs could readily circumvent the limitations on judicial review under Section 706(2). Because "[a]lmost any objection to an agency action can be dressed up as an agency's failure to act," *Public Citizen* v. *Nuclear Regulatory Comm'n*, 845 F.2d 1105, 1108 (D.C. Cir. 1988), a plaintiff could recharacterize a claim that could not satisfy Section 706(2)'s final agency action requirement as a claim under Section 706(1). The plaintiff could thereby obtain under Section 706(1) the very sort of "*wholesale* improvement" of an agency program that *National Wildlife Federation* forbids under Section 706(2). Indeed, the same agency conduct found unreviewable under Section 706(2) in *National Wildlife Federation* itself—"failure to revise land use plans in proper fashion, failure to submit certain recommendations to Congress, failure to consider multiple use, * * * failure to provide required public notice, failure to provide adequate environmental impact statements," 497 U.S. at 891—could then be reviewed as agency action "unlawfully withheld or unreasonably delayed" under Section 706(1).

The Ninth Circuit improperly sanctioned just such an approach in *Montana Wilderness Ass'n* v. *United States Forest Service*, 314 F.3d 1146 (2003), petitions for cert. pending,

[15] See Carol R. Miaskoff, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of the Administrative Procedure Act*, 55 Geo. Wash. L. Rev. 635, 636-637 n.9 (1987) ("[U]nrestrained use of the section 706(1) remedy may offend the doctrine of separation of powers to the extent that courts use this provision to direct the exercise of administrative discretion.").

Nos. 03-109 & 03-123 (filed July 22, 2003). There, the plaintiffs sought review under both Section 706(1) and Section 706(2) of the adequacy of the Forest Service's ongoing management of Montana wilderness study areas under a statute requiring the agency to "maintain their presently existing wilderness character." Montana Wilderness Study Act of 1997, Pub. L. No. 95-150, § 3(a), 91 Stat. 1244. The Ninth Circuit recognized that the suit was not cognizable under Section 706(2), because the Forest Service's challenged conduct "does not fit into any of the statutorily defined categories for agency action," 314 F.3d at 1150 (citing *National Wildlife Federation*, 497 U.S. at 899), and does not "mark the consummation of the [Forest Service's] decisionmaking process," *ibid.* (quoting *Bennett*, 520 U.S. at 178). The Ninth Circuit nonetheless held that the Forest Service's performance of the *same* day-to-day management activities could be challenged under Section 706(1), *id.* at 1151, and it "remand[ed] for trial" on whether "the Forest Service has discharged its duty to administer the [areas] so as to maintain their wilderness character and potential for inclusion in the Wilderness System," *id.* at 1152.

Finally, if Section 706(1) is confined to suits to compel an agency to take the same sort of action that would be reviewable under Section 706(2) as final agency action, interested persons will have a strong incentive to comply with the general requirement under the APA that they present their requests for action to the agency in the first instance, rather than proceed directly to court. See, *e.g.*, *Public Citizen Health Research Group*, 740 F.2d at 29 (explaining that whether FDA was required to issue a rule requiring aspirin warning labels was "a question whose resolution demands FDA's medical expertise in the first instance"). The APA, for example, specifically requires an agency to give an interested person the right to petition for the issuance, amendment, or repeal of a rule. See 5 U.S.C. 553(e); *Auer* v. *Robbins*, 519 U.S. 452, 459 (1997) (stating that a complaint about an agency's failure to amend its regulations should have been presented initially to the agency through a petition for rulemaking). And, although the APA does not similarly require an agency to afford anyone the right to petition for the issuance of an order, an agency may, of course, entertain such a request. If a person presents his request for action to the agency instead of going immediately to court, the agency has the opportunity to consider the relevant issues, develop an administrative record, and issue a decision on the request to the extent the agency deems appropriate, which could, in turn, serve as the basis for any judicial review that may be available under Section 706(2). See generally *Standard Oil*, 449 U.S. at 242-243; *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975).[16]



By contrast, if suits were allowed directly under Section 706(1) to challenge an agency's alleged failure to satisfy general statutory standards in its administration of its programs, the courts would be called upon to conduct correspondingly broad-ranging factual inquiries into the manner in which the agency operates on a day-to-day basis (see *Montana Wilderness Ass'n*, 314 F.3d at 1152 (remanding for trial on adequacy of the Forest Service's management of wilderness study areas)), rather than to focus on a discrete "final agency action" and the reasons given for that action by the agency itself in its administrative decision. The result

[16] Although under Section 706, as properly construed, an interested person ordinarily is required to request the agency to take final action (whether in the form of a rule or an order) before bringing suit, it does not follow that every response by an agency to such a request would be subject to judicial review under Section 706(2). Judicial review may be precluded by statute (5 U.S.C. 701(a)(1)), or the matter may be committed to agency discretion by law (5 U.S.C. 701(a)(2)), as would be true of an agency's decision whether to issue an order or rule in the exercise of its enforcement authority. See, *e.g.*, *Heckler* v. *Chaney*, 470 U.S. 832 (1985). In those situations, of course, the bar to judicial review under Section 706(2) may not be circumvented by bringing suit under Section 706(1).

would be to stand the APA on its head by giving Section 706(1)—which was intended to be a narrow avenue of relief available only in extraordinary circumstances to compel performance of a discrete and clearly defined legal duty—the broadest scope of all of the judicial review provisions of the APA.

## II. The Court Of Appeals Erred In Holding That Plaintiffs' Challenges To BLM's Management Of Off-Road Vehicle Use On Public Lands Are Cognizable Under Section 706(1)

The court of appeals held that Section 706(1) authorizes the district court to review the adequacy of BLM's ongoing administration of public lands in Utah in three respects: whether BLM is managing the wilderness study areas in accordance with FLPMA's requirement "not to impair the suitability of such areas for preservation as wilderness," 43 U.S.C. 1782(c); whether BLM is obligated to take a "hard look" at whether to supplement its prior environmental analyses under NEPA, 42 U.S.C. 4332(2)(C), to address increased off-road vehicle use on certain public lands; and whether BLM is completing various planning and management objectives identified in its own land use plans on a timely basis. None of those holdings represents a proper application of Section 706(1) under the standards identified above.

### A. Courts have no authority under Section 706(1) to review whether BLM is adequately managing public lands to maintain their suitability for preservation as wilderness

The court of appeals erred in holding that Section 706(1) authorizes the district court to entertain SUWA's claim that "BLM has in the past and continues today to permit [off-road vehicles] to impair the suitability of existing [wilderness study areas] from entry into the national wilderness preservation system," in violation of FLPMA. Br. in Opp. App. 21 (second amended complaint), 44 (third amended complaint). That is not a claim to compel a discrete final agency action that BLM is under a mandatory, non-discretionary duty to SUWA to perform. It is instead a broad programmatic challenge, under a general statutory standard, to BLM's ongoing administration of the Utah wilderness study areas. Such challenges are not cognizable under Section 706(1).



Congress has vested the Secretary of the Interior (and BLM as the Secretary's designee) with broad discretion in the management of wilderness study areas. With respect to wilderness study areas, FLPMA states, in general terms:

> During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness.

43 U.S.C. 1782(c). FLPMA does not specify what would constitute "impair[ment]" of a given area's "suitability" for "preservation as wilderness."[17] Nor does FLPMA identify any discrete final agency action that BLM is required to take in its management of wilderness study areas, such that a failure to take the action would render it "unlawfully withheld or unreasonably delayed" within the meaning of Section 706(1). Much less does FLPMA itself impose any such specific duties on BLM with respect to the particular issue of off-road vehicle use in those areas.

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[17] While the government's certiorari petition and briefs, like the opinions below, sometimes use the shorthand term "non-impairment standard" to refer to the standard stated in the first sentence of 43 U.S.C. 1782(c), it bears emphasis that the statute refers to "impair[ment]" of the "suitability" of an area for preservation as wilderness (*i.e.*, for congressional designation as wilderness), *not* more generally to any diminution in the natural state of lands or resources in a wilderness study area.

### *1. Plaintiffs' claim does not seek to compel final agency action*

SUWA's challenge to BLM's management of the Utah wilderness study areas cannot proceed under Section 706(1), because judicial review under Section 706(1), as under Section 706(2), is confined to final agency action. The complaint does not seek to compel SUWA to take *any* discrete final agency action that is specifically required by FLPMA. Rather, the pertinent count of the complaint seeks "a general judicial review of the BLM's day-to-day operations," *National Wildlife Federation*, 497 U.S. at 899, under the general non-impairment standard of 43 U.S.C. 1782(c) with respect to off-road vehicle management. Neither of the courts below read the complaint otherwise.

As this Court explained in *National Wildlife Federation*, an agency's "day-to-day operations," including its management of public lands, do not constitute "an identifiable 'agency action'" under the APA, "much less a 'final agency action.'" 497 U.S. at 890-891. The Court's reasoning, although directed to a claim under Section 706(2), is equally applicable to SUWA's non-impairment claim under Section 706(1), because the APA does not distinguish between those provisions in confining judicial review to "agency action" and, in the absence of a statute providing otherwise, to "final agency action." See pp. 13-18, *supra*. Thus, as Judge McKay observed below, "review under the APA is strictly reserved for cases addressing *specific instances* of agency action or inaction rather than programmatic attacks" of the sort involved here. Pet. App. 42a (McKay, J., dissenting in part).

The court of appeals reasoned that Section 706(1) allows a court to review, and thus to remedy, any claim that an agency has not fully adhered to a general statutory standard in its ongoing administration of a program. After observing that "the APA treats an agency's inaction as 'action,'" the court stated that "the agency's inaction under these circumstances is, in essence, the same as if the agency had issued a final order or rule declaring that it would not complete its legally required duty." Pet. App. 16a. The court's analysis is untenable. Although the APA defines "agency action" to include, as appropriate, "failure to act," 5 U.S.C. 551(13), the latter term refers only to a failure to take discrete agency action, such as issuance of a "rule" or "order," because the term takes its meaning from such more specific examples of affirmative agency action in the statutory definition. See pp. 13-14, *supra*. It does not follow, as the court of appeals erroneously believed, that any and all varieties of agency inaction—or even, as here, allegedly inadequate action—can be equated with "a final order or rule" (Pet. App. 16a) and reviewed under Section 706(1) or Section 706(2). Moreover, the inclusion of "failure to act" in the statutory definition of "agency action" has no apparent relevance to Section 706(1), because it would make no sense to speak of a court's "compel[ling] [a failure to act] unlawfully withheld or unreasonably delayed." 5 U.S.C. 706(1).



Here, as noted above, BLM is under no statutory obligation to take any particular final agency action in its management of off-road vehicle use in wilderness study areas. Although BLM has discretion to address issues of off-road vehicle use by taking some form of final agency action (see Pet. App. 18a n.10), that does not mean that BLM's allegedly inadequate response to those issues is reviewable under Section 706(1).

### *2. Plaintiffs' claim does not seek to enforce a mandatory, non-discretionary duty*

The court of appeals' holding that SUWA's statutory non-impairment claim may proceed under Section 706(1) is also contrary to the understanding that Section 706(1) authorizes only relief in the nature of mandamus, *i.e.*, to "require an agency to take action upon a matter, without directing how it shall act." *Attorney General's Manual* 108. Neither SUWA

nor the court of appeals disputed that BLM is, in fact, taking measures to prevent impairment of the suitability of the Utah wilderness study areas for wilderness protection, including measures to regulate off-road vehicles. Accordingly, in order to decide whether SUWA would be entitled to any relief on remand, the district court would have to determine whether those measures are sufficient to satisfy FLPMA's general non-impairment standard and, if not, to order BLM to take different or additional measures. Such an order would necessarily entail the court's directing the agency how to exercise its discretion on an ongoing programmatic basis. See Pet. App. 46a (McKay, J., dissenting in part) (observing that any remedy granted on remand in this case "would involve the district court in the ongoing review of every management decision allegedly threatening achievement of the nonimpairment mandate").

The court of appeals assumed that Section 706(1) permits judicial review of an agency's compliance with any "mandatory" statutory standard—here, that "the Secretary *shall* continue to manage [wilderness study areas] * * * so as not to impair the[ir] suitability * * * for preservation as wilderness," 43 U.S.C. 1782(c) (emphasis added)—regardless of the degree of generality with which the standard is phrased or the degree of discretion that is vested in the agency to define and achieve that standard. See Pet. App. 14a. The court of appeals disregarded settled mandamus law incorporated into Section 706(1). Under that law, if a plaintiff is seeking relief that would "guide and control [an official's] judgment or discretion in the matters committed to his care," *Decatur*, 39 U.S. (14 Pet.) at 515, a court has no authority to order it, even if the official is *required*, not merely *permitted*, to exercise his judgment or discretion in the matter. See, *e.g.*, *New York, New Haven & Hartford R.R.*, 287 U.S. at 192-204 (holding that, when a statute required the ICC to prepare a valuation of railroad property,



but did not specify the methodology to be used in any "clear and peremptory" way, mandamus could not issue to direct how the ICC was to conduct the valuation). Accordingly, having recognized that BLM has wide "discretion" in its "interpretation" and "implementation" of FLPMA's non-impairment standard (Pet. App. 14a) (emphasis omitted), the court of appeals was required to hold that Section 706(1) does not provide a vehicle for guiding that discretion.

To be sure, when a statute requires an official to take some action that involves the exercise of judgment or discretion, and the official fails to act *at all*, Section 706(1) or mandamus may be invoked "not [to] ask for a decision any particular way but only that it be made one way or the other." *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 184 (1925); see *Attorney General's Manual* 108. No such relief would be warranted in this case, however, because SUWA acknowledged that BLM is taking measures to prevent impairment of the suitability of the Utah wilderness study areas for wilderness designation. Moreover, the relief that SUWA has sought in this case is not merely a judicial order, essentially in the terms of FLPMA itself, directing BLM to manage the wilderness study areas "so as not to impair the[ir] suitability * * * for preservation as wilderness." 43 U.S.C. 1782(c). Rather, SUWA has sought to compel measures, such as the closing of certain areas to off-road vehicles, that do not appear in Section 1782(c) itself and that BLM has broad discretion under FLPMA to select or reject in determining how most appropriately to satisfy the general statutory standard of non-impairment of the suitability of the overall tract for preservation as wilderness.

The court of appeals expressed concern that, if judicial review was not available under Section 706(1) in cases such as this one, "a 'no-man's-land' of judicial review" would exist, "in which a federal agency could fl[ou]t mandatory, non-discretionary duties simply because it might be able to

satisfy these duties through some form of non-final action." Pet. App. 18a n.10. The court's concern is unwarranted. As explained above, if a person believes that an agency is not administering a program in accordance with statutory requirements, the appropriate course is to request particular action from the agency itself in the first instance. If the agency's response constitutes final agency action—and if requirements of standing, ripeness, and reviewability under the APA are satisfied—that action could be reviewed under Section 706(2) based on the administrative record. In any event, as the Attorney General's Committee on Administrative Procedure recognized, judicial review is not the only mechanism—and often is not the most appropriate mechanism—for assuring that agencies adequately perform their statutory responsibilities, especially in a climate of limited resources. See pp. 21-22, *supra*.

**B. Courts have no authority under Section 706(1) to order BLM to consider whether to undertake supplemental environmental analyses under NEPA**

The court of appeals also erred in concluding that BLM could be compelled under Section 706(1) to take a "hard look" at whether increased off-road vehicle use in certain areas warranted the preparation of supplemental environmental analyses under NEPA. See Pet. App. 32a-39a. An environmental impact statement or environmental assessment under NEPA is not, in and of itself, final agency action reviewable under the APA. Nor is BLM subject to any mandatory, non-discretionary duty of the sort that may be compelled under Section 706(1) to consider whether to supplement its prior NEPA environmental analyses in the circumstances here.

NEPA requires a federal agency to prepare an environmental impact statement, or EIS, only when the agency is proposing "legislation or other *major Federal actions* significantly affecting the quality of the human environment."



42 U.S.C. 4332(2)(C) (emphasis added). An environmental impact statement is designed to "focus[] Government and public attention on the environmental effects of proposed agency action" so that "the agency will not act on incomplete information" and "the public and other government agencies [can] react to the effects of a proposed action at a meaningful time." *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 371 (1989). An agency may undertake an environmental assessment to determine whether the proposed action requires an environmental impact statement. See 40 C.F.R. 1501.4(b), 1508.9(a)(1), 1508.13.

An agency is required to supplement an existing environmental impact statement only in response to "substantial changes in *the proposed action* that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on *the proposed action* or its impacts." 40 C.F.R. 1502.9(c)(1)(i) and (ii) (emphases added). In that specific context—namely, when the major federal action to which the initial environmental impact statement was addressed has not yet been taken or completed—an agency must take a "hard look" at intervening developments relevant to environmental concerns to determine whether supplementation is required before it takes or completes the action. As this Court has explained, NEPA "require[s] that agencies take a 'hard look' at the environmental effects of their planned action, even after a proposal has received initial approval," but only "[i]f there remains 'major Federal actio[n]' to occur." *Marsh*, 490 U.S. at 374; see 40 C.F.R. 1500.1(b) ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.").

An environmental impact statement is not itself "final agency action" within the meaning of the APA. Standing alone, an environmental impact statement does not create

rights or obligations or produce other legal consequences. See *Bennett*, 520 U.S. at 177-178. It is instead a procedural prerequisite to taking some *other* step that may, in turn, qualify as "final agency action" reviewable under Section 706(2) of the APA—namely, a decision by the agency to undertake a "major Federal action" that is subject to NEPA. See *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process."). Such "preliminary, procedural, or intermediate agency action," as distinguished from final agency action, is "not directly reviewable" under the APA, although it "is subject to review on the review of the final agency action." 5 U.S.C. 704; see *Standard Oil*, 449 U.S. at 244-245 (discussing APA's treatment of preliminary action); see also, *e.g.*, *Marsh*, 490 U.S. at 368, 375-378 (reviewing adequacy of EIS and refusal to supplement it in context of APA challenge under Section 706(2) to "major Federal action" of decision to construct dam); *Robertson*, 490 U.S. at 345-346 (reviewing adequacy of EIS in context of challenge to "major Federal action" of decision to issue permit for ski area). For those reasons, neither an agency's preparation of an environmental impact statement nor an agency's "hard look" at whether to supplement an existing one is itself the sort of undertaking that may independently be compelled under Section 706(1).

In any event, as explained above, BLM has no clear, nondiscretionary duty of the sort that may be enforced under Section 706(1) to take a "hard look" at whether to supplement its environmental impact statements and environmental assessments for the areas of land involved in this case. Such a duty exists only when an agency is proposing to take a new "major Federal action" or deciding whether to make substantial changes to a previously analyzed action that has not been completed. 42 U.S.C. 4332(2)(C); see *Kleppe* v. *Sierra Club*, 427 U.S. 390, 401 (1976); *Northcoast*



*Envtl. Ctr.* v. *Glickman*, 136 F.3d 660, 670 (9th Cir. 1998) (NEPA analysis not required in absence of "discrete agency action"). Neither SUWA's NEPA claim nor the court of appeals' ruling allowing that claim to go forward rests on the premise that BLM was proposing any "major Federal action" for those lands, or even that it had rendered a final decision rejecting a petition to take such action. SUWA may well believe that BLM *should* take certain action (such as promulgating new rules governing off-road vehicle use), preceded by an appropriate NEPA analysis to address the environmental concerns that it has identified. And, if BLM were to issue a final decision to take (or not to take) such action, SUWA could seek review of *that* decision (to the extent that review would be available under Section 706(2) of the APA), including review of any NEPA analysis that BLM conducted or allegedly should have conducted in connection with its decision. But NEPA imposes no free-standing obligation on BLM to conduct an environmental analysis divorced from a proposed "major Federal action," and SUWA has no free-standing right enforceable under Section 706(1) to compel BLM to do so.

The Tenth Circuit's holding that BLM can be compelled to take a "hard look" at whether to undertake supplemental NEPA analyses (and to perform other tasks) is particularly troubling in light of the court's suggestions that BLM's resource constraints could not provide any justification for denying such relief under Section 706(1). Pet. App. 37a-38a. The court stated that an "inadequate resource defense must be reserved for any contempt proceedings that might arise if the agency fails to carry out a mandatory duty after being ordered to do so by a court." *Id.* at 38a; cf. *Sierra Club* v. *Thomas*, 828 F.2d 783, 798 (D.C. Cir. 1987) (taking agency's "broad mandate" and "finite resources" into account in determining that agency action should not be compelled under Section 706(1)). The court similarly disregarded

BLM's assurances that NEPA analyses would, in fact, be conducted in the near future as circumstances permitted in connection with its contemplated revision of land use plans. Pet. App. 38a. The court's holding that Section 706(1) may be invoked to reorder agency priorities for the allocation of scarce resources—under the threat of contempt proceedings that would divert agency officials from their usual duties and brand them as miscreants—would be inimical to the effective functioning of government and to the separation of powers. Cf. *Coker* v. *Sullivan*, 902 F.2d 84, 89 (D.C. Cir. 1990) (R.B. Ginsburg, J.) (observing that, when an agency "has many programs to supervise and may consciously have decided to concentrate monitoring on some elements of [one] program rather than others," a court "should not steer the [agency's] resources and shape its priorities when [the court] lack[s] knowledge of the matters competing for the [agency's] attention").

### C. Courts have no authority under Section 706(1) to compel BLM to perform planning and management tasks identified in its land use plans

The court of appeals erred in concluding that BLM could be ordered under Section 706(1) to perform tasks—such as monitoring off-road vehicle use, disseminating information on off-road vehicle restrictions, and preparing an off-road vehicle plan—that the agency identified in its land use plans for the areas involved in this case. A land use plan is a tool to guide BLM's management of public lands, including BLM's taking of future site-specific actions in the area covered by the plan. The identification in a land use plan of objectives that BLM seeks to achieve or tasks that BLM intends to perform in the future does not convert those objectives and tasks into mandatory, non-discretionary duties that are owed to particular members of the public and are independently enforceable under Section 706(1). Nor do the tasks identified in a land use plan typically involve the



taking of final agency action that can be either compelled under Section 706(1) or set aside under Section 706(2).

#### *1. A BLM land use plan is not a source of mandatory, non-discretionary duties that may be enforced under Section 706(1)*

a. FLPMA provides that the Secretary of the Interior (and BLM as the Secretary's designee) "shall * * * develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands." 43 U.S.C. 1712(a). FLPMA describes land use planning as a process for "project[ing]" the "present and future use" of public lands and resources. 43 U.S.C. 1701(a)(2). The House Report elaborates that land use planning under FLPMA is to be "dynamic and subject to change with changing conditions and values." H.R. Rep. No. 1163, 94th Cong., 2d Sess. 5 (1976). Although FLPMA articulates general criteria to guide BLM's creation and revision of land use plans—such as to "use and observe the principles of multiple use and sustained yield," "give priority to the designation and protection of areas of critical environmental concern," and "weigh long-term benefits to the public against short-term benefits," 43 U.S.C. 1712(c)(1), (3), and (7)—FLPMA does not require BLM to resolve any particular issues or to reach any particular results in such plans.

BLM's implementing regulations likewise reflect that land use plans are a step in the process of deciding how particular lands and resources are to be managed. The regulations explain that a land use plan is "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 C.F.R. 1601.0-2. A land use plan thus "generally establishes," among other things, "[l]and areas for limited, restricted or exclusive use," "[a]llowable resource uses," "[r]esource condition goals and objectives," "general management practices," and "[s]upport action, including

such measures as resource protection, access development, [and] realty action." 43 C.F.R. 1601.0-5(k). A land use plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." *Ibid.* And BLM may amend or revise a land use plan as circumstances warrant. See 43 C.F.R. 1601.5-5, 1601.5-6.

A single land use plan may exceed 100 pages in length, cover an area of more than a million acres, and address numerous and diverse projected activities and tasks involving, for example, wildlife habitat protection, mineral extraction, livestock grazing, identification of cultural resources, management of off-road vehicles, and development of campgrounds and other recreational facilities. When, and even whether, any particular goal or future task identified in a land use plan will be accomplished is necessarily contingent on available resources, competing agency priorities, and other factors that may change over time. As BLM explained in one of the land use plans sought to be enforced in this case, its "ability to complete the identified projects is directly dependent on the BLM budgeting process," and "[t]he priorities for accomplishment * * * may be revised based upon changes in law, regulations, policy, or economic factors such as cost-effectiveness of projects." BLM, *Resource Management Plan Record of Decision and Rangeland Program Summary for the San Juan Resource Area* 15 (Mar. 1991). A number of other land use plans for areas involved in this case contain similar cautionary language.[18]

[18] See St. George Field Office, BLM, *Record of Decision and Resource Management Plan* 1.7-1.8 (Mar. 1999) ("In implementing the Plan, BLM will focus its limited resources at any given time on those highest priority issues which BLM determines have the greatest significance to the health of the public lands involved and the socioeconomic well-being of local communities dependent on them. Less important issues will be deferred until priority programs and projects are implemented and found to be effective."); Vernal Dist. Office, BLM, *Diamond Mountain Resource Area Resource Management Plan and Record of Decision* 4-1 (Fall 1994) ("Implementation of many of the planned actions in this RMP is dependent upon the availability of funding and personnel."); Salt Lake Dist., BLM, *Record of Decision and Rangeland Program Summary for the Box Elder Resource Management Plan* 1 (1986) ("The ability of the Salt Lake District to complete the identified projects is directly dependent upon the BLM budgeting process. The priorities for accomplishment will be reviewed annually and may be revised based upon changes in law, regulations, policy, or economic factors such as cost effectiveness of projects."); Vernal Dist. Office, BLM, *Record of Decision and Rangeland Program Summary for the Book Cliffs Resource Management Plan* 1 (May 1985) ("The ability of the Vernal District to complete the identified projects is directly dependent upon the BLM budgeting process. If insufficient funding is appropriated for any given year, some delays in the completion schedule may result."); Cedar City Dist. Office, BLM, *Cedar Beaver Garfield Antimony Resource Management Plan* 3 (Oct. 1984) ("Implementation of many actions will be tied to the budget and funding allocations through the Annual Work Planning process. Completion of these projects will be dependent on receiving adequate funding allocations. Many funding decisions are made outside of the planning system and affect the achievement of program objectives and implementation of management actions.").



This Court has recognized that the Forest Service's forest plans, which resemble BLM's land use plans, are "tools for agency planning and management," "merely programmatic in nature," subject to continuing revision and refinement, and "often not fully implemented." *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 735-737 (1998). The Court explained that such plans, in and of themselves, "do not command anyone to do anything or to refrain from doing anything"; "do not grant, withhold, or modify any formal legal license, power, or authority"; "do not subject anyone to any civil or criminal liability," and "create no legal rights or obligations." *Id.* at 733. The Court therefore held that a challenge to provisions of a forest plan that allowed certain types of logging within a national forest was not ripe for adjudication, because no such logging could occur until the Forest Service rendered a final administrative decision to

permit logging at a specific site, which would itself be final agency action reviewable under the APA. See *id.* at 733-737.

b. BLM's land use plans, given their character as dynamic tools to guide BLM's management, planning, and future site-specific activities, are not the source of duties to perform particular tasks that are independently enforceable under Section 706(1). The identification in a land use plan of the various tasks that BLM *voluntarily* intends to undertake in an area does not transform those tasks into *mandatory, non-discretionary* duties that BLM owes to particular members of the public and that BLM may be compelled by a court to undertake. A land use plan cannot be equated with, for example, a command in an Act of Congress to complete specific agency action within a specific period of time. See, *e.g.*, *Forest Guardians* v. *Babbitt*, 174 F.3d 1178 (10th Cir. 1999) (enforcing duty to designate critical habitat of a species under Endangered Species Act by specified statutory deadline). In contrast to such a statute, a BLM land use plan is not "an administrative straight-jacket which eliminates the room for any flexibility to meet changing conditions." *NRDC, Inc.* v. *Hodel*, 624 F. Supp. 1045, 1060 (D. Nev. 1985), aff'd, 819 F.2d 927 (9th Cir. 1987).

To order BLM to complete a particular task identified in a land use plan—in contravention of the agency's own priorities for the use of its limited resources—would be to intrude into BLM's discretion with regard to land use planning and management. Such interference with BLM's "ordinary duties * * * would be productive of nothing but mischief," *Decatur*, 39 U.S. (14 Pet.) at 516, for it would permit private litigants and courts to set BLM's agenda for its administration of public lands. As Judge McKay observed in dissent below, allowing "plaintiffs of all varieties" to use Section 706(1) to challenge an agency's failure to meet every objective in a land use plan would "substantially impede an agency's day-to-day operations." Pet. App. 50a. It could



ultimately encourage agencies to draft land use plans that are unduly circumscribed in their goals and unduly general in their projected means, and thus less useful for the purposes that Congress and BLM intended.

Contrary to the court of appeals' view, neither FLPMA nor BLM's implementing regulations contemplates that the planning and management tasks identified in a land use plan are to be independently enforceable under Section 706(1). Both FLPMA's provision that "[t]he Secretary shall manage the public lands * * * in accordance with the land use plan developed by him," 43 U.S.C. 1732(a), and the regulations' requirement that "[a]ll future resource management authorizations and actions * * * shall conform to the approved plan," 43 C.F.R. 1610.5-3(a), simply prevent BLM "from approving or undertaking affirmative projects inconsistent with its land use plans." Pet. App. 49a (McKay, J., dissenting in part). Thus, while the regulations require that any *future* final agency action that BLM elects to undertake be consistent with the land use plan, they do not suggest that BLM has a mandatory, judicially enforceable duty to accomplish any particular objective or undertake any particular activity identified in the plan itself.

The court of appeals also relied on 43 C.F.R. 1601.0-5(c), which it misinterpreted as requiring BLM to "adhere" to the "terms, conditions, and decisions" in its land use plans, and thereby as imposing a judicially enforceable duty to complete all tasks identified in a land use plan. See Pet. App. 26a, 29a. That regulation is concerned with the separate issue of consistency between BLM's land use plans and the plans of *other* agencies. See 43 C.F.R. 1610.3-2. It has nothing to with whether provisions in BLM's *own* plans create mandatory, non-discretionary duties that may be enforced under Section 706(1).[19]

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[19] In 43 C.F.R. 1601.0-5(c), on which the court of appeals relied, the term "consistent" is defined as "mean[ing] the Bureau of Land

As Judge McKay recognized, therefore, "successful challenges to land use plans have only involved *final* agency decisions made pursuant to existing land use plans." Pet. App. 49a-50a. Nothing in FLPMA or BLM's regulations confers a right on any private person to insist that particular objectives or tasks identified in a land use plan be accomplished. Nor does anything in FLPMA or the regulations confer a right on any private person to challenge alleged deficiencies in BLM's general managerial performance under land use plans, including any failure to complete the sorts of monitoring and subsidiary planning activities that were the focus of SUWA's challenge at the preliminary injunction stage of this case.

***2. The tasks identified in BLM's land use plans generally do not require the taking of final agency action that may be compelled under Section 706(1)***

In any event, even if BLM's land use plans could be a source of some mandatory, non-discretionary duties enforceable under Section 706(1), a court could enforce only a duty to do something that, once done, would be final agency action within the meaning of the APA. The tasks set forth in a land use plan do not, for the most part, constitute measures that, if completed, would be final agency action reviewable under Section 706(2).

For example, to the extent that SUWA's complaint refers to specific tasks identified in BLM's land use plans that

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Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, with policies and programs." The concept of "consistency" is addressed in substantive terms in 43 C.F.R. 1610.3-2(a), which provides that BLM's land use plans "shall be consistent with officially approved or adopted resource related plans * * * of *other* Federal agencies, State and local governments and Indian tribes," so long as BLM's plans are also consistent with the purposes, policies, and programs of federal laws applicable to public lands (emphasis added).



allegedly had not been completed when the complaint was filed, most of those tasks involve day-to-day planning and management activities, not final agency action. They include such activities as "the preparation of maps and other informational materials for distribution to the public, the creation of monitoring plans and protocols, and the marking and signing of designated trails." Br. in Opp. App. 16, 20 (second amended complaint); see *id.* at 39-43 (third amended complaint). The performance of such tasks does not constitute final agency action for purposes of APA review. Such performance does not "mark the 'consummation' of the agency's decisionmaking process" on any discrete matter and does not determine "rights or obligations" or otherwise carry "legal consequences." *Bennett*, 520 U.S. at 178.

Other tasks enumerated by SUWA, such as "the preparation of detailed [off-road vehicle] implementation plans and/or [off-road vehicle] travel plans," may constitute final agency action when completed. Br. in Opp. App. 20. A subsidiary planning document that opens or closes particular routes to off-road vehicles would ordinarily be the sort of discrete agency action that concludes the agency's decisionmaking and "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 178. The San Rafael Route Designation Plan—which was completed in February 2003, thereby mooting SUWA's claim to compel it—contains restrictions of that variety. See *San Rafael Route Designation Plan* (visited Jan. 2, 2004) <http://www.ut.blm.gov/sanrafaelohv/decision.htm>. But whether such planning documents will amount to final agency action can often be ascertained only after they have been prepared. And, in any event, at least in the absence of an express statement in the land use plan itself, a plan provision contemplating the preparation of such documents does not create any mandatory, non-discretionary duty to issue them or give rise to any judicially enforceable

private right to insist that BLM do so. For these reasons, such a plan provision is not judicially enforceable under Section 706(1).

* * * * *

In sum, an agency's ongoing programmatic activities are not subject to judicial review under Section 706(1), just as they are not subject to judicial review under Section 706(2), as this Court made clear in *National Wildlife Federation*. The invocation of Section 706(1) sanctioned by the Tenth Circuit in this case would permit courts to engage in wide-ranging review of an agency's entire course of conduct, to order systemic changes in an agency's day-to-day operations that were not even sought from the agency in the first instance, and to divert scarce resources from the activities chosen by the agency. Such judicial intrusion into the responsibilities of the Executive Branch is inconsistent with the separation of powers under the Constitution. As this Court recognized in *National Wildlife Federation*, plaintiffs "cannot seek *wholesale* improvement of [an agency's] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." 497 U.S. at 891; accord Pet. App. 42a-43a (McKay, J., dissenting in part). That principle applies equally under Section 706(1) as under Section 706(2).



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2004

## APPENDIX

1. 5 U.S.C. 551 provides:

**Definition**

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;



(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given,

but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.

2. 5 U.S.C. 701 provides:

**Application; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; subchapter II of chapter 471 of title 49; or sections 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix; and



(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

3. 5 U.S.C. 702 provides:

**Right of review**

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

4. 5 U.S.C. 703 provides:

**Form and venue of proceeding**

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action,

including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

5. 5 U.S.C. 704 provides:

**Actions reviewable**

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

6. 5 U.S.C. 705 provides:

**Relief pending review**

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be



taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

7. 5 U.S.C. 706 provides:

**Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

8. 42 U.S.C. 4332 provides in part:

**Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts**

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

* * * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and



(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

* * * * *

9. 43 U.S.C. 1712 provides in part:

**Land use plans**

**(a) Development, maintenance, and revision by Secretary**

The Secretary [of the Interior] shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

* * * * *

**(c) Criteria for development and revision**

In the development and revision of land use plans, the Secretary shall—

(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;

(3) give priority to the designation and protection of areas of critical environmental concern;

(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;

(5) consider present and potential uses of the public lands;

(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;

(7) weigh long-term benefits to the public against short-term benefits;

(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and

(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C.A. § 460l-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs. In implementing this directive, the Secretary



shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. Land use plans of the Secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act.

* * * * *

10. 43 U.S.C. 1732 provides in part:

**Management of use, occupancy, and development of public lands**

**(a) Multiple use and sustained yield requirements applicable; exception**

The Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans developed by him under section 1712 of this title when they are available, except that where a tract of such public land has been dedicated to specific uses

according to any other provisions of law it shall be managed in accordance with such law.

* * * * *

11. 43 U.S.C. 1782 provides:

**Bureau of Land Management Wilderness Study**

**(a) Lands subject to review and designation as wilderness**

Within fifteen years after October 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act of September 3, 1964 (78 Stat. 890; 16 U.S.C. 1131 et seq.) and shall from time to time report to the President his recommendation as to the suitability or nonsuitability of each such area or island for preservation as wilderness: Provided, That prior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present in such areas: Provided further, That the Secretary shall report to the President by July 1, 1980, his recommendations on those areas which the Secretary has prior to November 1, 1975, formally identified as natural or primitive areas. The review required by this subsection shall be conducted in accordance with the procedure specified in section 3(d) of the Wilderness Act [16 U.S.C.A. § 1132(d)].

**(b) Presidential recommendation for designation as wilderness**

The President shall advise the President of the Senate and the Speaker of the House of Representatives of his recommendations with respect to designation as wilderness



of each such area, together with a map thereof and a definition of its boundaries. Such advice by the President shall be given within two years of the receipt of each report from the Secretary. A recommendation of the President for designation as wilderness shall become effective only if so provided by an Act of Congress.

**(c) Status of lands during period of review and determination**

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection. Unless previously withdrawn from appropriation under the mining laws, such lands shall continue to be subject to such appropriation during the period of review unless withdrawn by the Secretary under the procedures of section 1714 of this title for reasons other than preservation of their wilderness character. Once an area has been designated for preservation as wilderness, the provisions of the Wilderness Act [16 U.S.C.A. § 1131 et seq.] which apply to national forest wilderness areas shall apply with respect to the administration and use of such designated area, including mineral surveys required by section 4(d)(2) of the Wilderness Act [16 U.S.C.A. § 1133(d)(2)], and mineral development, access, exchange of lands, and ingress and egress for mining claimants and occupants.

12. 43 C.F.R. 1601.0-2 provides:

**Objective.**

The objective of resource management planning by the Bureau of Land Management is to maximize resource values for the public through a rational, consistently applied set of regulations and procedures which promote the concept of multiple use management and ensure participation by the public, state and local governments, Indian tribes and appropriate Federal agencies. Resource management plans are designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses.

13. 43 C.F.R. 1601.0-5 provides in part:

**Definitions.**

* * * * *

(c) "Consistent" means that the Bureau of Land Management plans will adhere to the terms, conditions, and decisions of officially approved and adopted resource related plans, or in their absence, with policies and programs, subject to the qualifications in § 1615.2 of this title.

* * * * *

(k) "Resource management plan" means a land use plan as described by the Federal Land Policy and Management Act. The resource management plan generally establishes in a written document:

(1) Land areas for limited, restricted or exclusive use; designation, including ACEC designation; and transfer from Bureau of Land Management Administration;



(2) Allowable resource uses (either singly or in combination) and related levels of production or use to be maintained;

(3) Resource condition goals and objectives to be attained;

(4) Program constraints and general management practices needed to achieve the above items;

(5) Need for an area to be covered by more detailed and specific plans;

(6) Support action, including such measures as resource protection, access development, realty action, cadastral survey, etc., as necessary to achieve the above;

(7) General implementation sequences, where carrying out a planned action is dependent upon prior accomplishment of another planned action; and

(8) Intervals and standards for monitoring and evaluating the plan to determine the effectiveness of the plan and the need for amendment or revision.

It is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations.

14. 43 C.F.R. 1610.3-2 provides in part:

**Consistency requirements.**

(a) Guidance and resource management plans and amendments to management framework plans shall be consistent with officially approved or adopted resource related plans, and the policies and programs contained therein, of other Federal agencies, State and local governments and Indian tribes, so long as the guidance and resource management plans are also consistent with the purposes, policies and programs of Federal laws and regulations applicable to

public lands, including Federal and State pollution control laws as implemented by applicable Federal and State air, water, noise, and other pollution standards or implementation plans.

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15. 43 C.F.R. 1610.5-3 provides in part:

**Conformity and implementation.**

(a) All future resource management authorizations and actions, as well as budget or other action proposals to higher levels in the Bureau of Land Management and Department, and subsequent more detailed or specific planning, shall conform to the approved plan.

(b) After a plan is approved or amended, and if otherwise authorized by law, regulation, contract, permit, cooperative agreement or other instrument of occupancy and use, the District and Area Manager shall take appropriate measures, subject to valid existing rights, to make operations and activities under existing permits, contracts, cooperative agreements or other instruments for occupancy and use, conform to the approved plan or amendment within a reasonable period of time. Any person adversely affected by a specific action being proposed to implement some portion of a resource management plan or amendment may appeal such action pursuant to 43 CFR 4.400 at the time the action is proposed for implementation.

(c) If a proposed action is not in conformance, and warrants further consideration before a plan revision is scheduled, such consideration shall be through a plan amendment in accordance with the provisions of §1610.5-5 of this title.

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